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IN THE
Supreme Court of the United States

No. 340

INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
HAVERHILL TYPOGRAPHICAL UNION No. 38,
WORCESTER TYPOGRAPHICAL UNION No. 165, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Writ of Certiorari to the United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR PETITIONERS

I. THE GENERAL LAWS CLAUSE IS VALID

The Board's Brief once more introduces some novel theories by which it is asserted the Board's decision and order can be sustained. But the Board carries a heavy burden in attempting to hold contract proposals unlawful. Manifestly, it will not do to speculate that there *may be* discrimination under them, for this can be said of any agreement, irrespective of its terms.

"Discrimination," by definition, requires a conscious act on the part of an employer or union granting preference to an individual or class on the basis of union membership or non-membership. Because Section 8(a) (3) is limited to *that* specific kind of discrimination, the illegal preference must be knowingly, i.e., "intentionally" based upon that factor. See, *NLRB v. Ford Radio & Mica Corp.*, 258 F. 2d 457, 461-463 (CA 2); *NLRB v. Miami Coca-Cola Bottling Co.*, 222 F. 2d 341, 344 (CA 5); *Osecola Co. Co-op Creamery Ass'n v. NLRB*, 251 F. 2d 62, 68 (CA 8); *NLRB v. Kaiser Aluminum & Chem. Corp.*, 217 F. 2d 366, 368 (CA 9). Since the unions' proposals would not, if adopted, have "caused discrimination", and since the Board does not even purport to establish the elements of an "attempt" (analyzed at pages 14-15 of our main brief),¹ neither the proposals nor the strikes were an "attempt to cause discrimination". The Board has thus been driven to elaborate formulae, the chief characteristic of which is that they substitute for the objective standard of "discrimination" entirely subjective speculations concerning how other people would regard the agreement.² These circumlocutions have

¹ Our main brief in this case will be cited hereafter as "Br." The Board's brief will be cited as "Bd. Br."

² "the contracting parties could reasonably foresee . . . the employees would be more likely to conclude" (Bd. br., p. 15); ". . . how the employees are apt to view it . . ." (p. 16); ". . . the foreman would be prompted to abide by those rules . . . must be deemed to have intended to maintain a closed shop" (p. 17); ". . . tantamount to incorporating the closed shop provisions . . ." (p. 17); ". . . may be deemed to include those provisions of the laws limiting employment to union members" (p. 21); ". . . the contracting parties could reasonably foresee . . . the employees would not undertake to decide for themselves . . . would treat all of the laws as incorporated" (p. 23); "must be deemed to have intended

no basis in the statute and are such vague and inadequate guides to conduct that they would violate due process if Congress had adopted them. See, e.g., *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223-24; *United States v. Local 807, IBT*, 315 U.S. 521, 532: "The state of mind of the truck owners cannot be decisive of the guilt of these defendants."

The new factor introduced by the Board is consistent with this approach, since it also relies on the state of mind of others—now of the employers from whom the unions sought agreement, who are the charging parties in these cases.³ The Board asserts "it is plain that the publishers in fact understood that . . . petitioners were calling for the execution and enforcement of contracts contemplating closed-shop conditions." (Bd. br. p. 24) It attributes to the publishers the "understanding" that the "not in conflict with law" language was not "intended to exclude the closed shop provisions of the General Laws from this contract." (*id.* p. 25). No record reference or finding is cited for either of these propositions. And while the em-

to operate under closed shop conditions . . ." (p. 24); "what the words . . . are likely to mean to the employees" (p. 26); "the employees would regard all of the laws as incorporated . . ." (p. 26); "the employer could expect that he (the foreman) would use that power" (p. 28); "if the employer were to agree . . . he must be deemed to have intended" (p. 28); "there would be no reason for him to assume that he did not remain free . . ." (p. 28); "the foreman clause . . . contemplated that the foreman would . . ." (p. 29); "tantamount to incorporating the closed shop provisions . . ." (p. 30)."

³ Compare *United States v. Local 807, IBT*, *supra*: "To make a fine or prison sentence for the union and its members contingent upon a finding by the jury that one motive or the other dominated the employers' decision would be a distortion of the legislative purpose." 315 U.S. at 532-33.

employers' erroneous "understanding" of the laws clause could in no event be determinative of its legality, the dangers of the Board's subjective approach will perhaps be illustrated by examining this latest version.

A. In the Haverhill negotiations the matter was quite clear. The publishers' main objection to the union proposals was to the jurisdiction clause; the laws clause was unsatisfactory to the company because as they "understood the union laws, if you accepted the union laws you accepted jurisdiction." (R. 42) See also R. 49-50. The Board so found. (R. 436) The objections to the jurisdiction clause were practical, not legal. (R. 43). The Board so found. (R. 436). The only citation in the discussion (Bd. br. pp. 24-25) is to the Board's entire statement of the case; it is not "shown" even in this argumentative and selective narration that the publishers objected to the Laws clause "on the ground that this would establish a closed shop." (Bd. br. p. 24). When, after the strike began, the company brought in Phillips and Parry to represent it, its instructions were consistent with this position. (R. 90-93). Specifically Parry testified that "I don't recall that the closed shop features of the General Laws were discussed". (R. 92) The Examiner's contrary finding (R. 439) is entirely unsupported, and was explicitly excepted to. (R. 477). The Board allowed it to stand, but, quite properly, does not rely on it here.

If actions speak louder than self-serving declarations *ante litem motam*, the negotiations at Worcester give no greater support to the Board. For Worcester had previously executed an agreement containing the General Laws clause (R. 130, 351). Indeed, until the

end of 1954 the parties had always operated under a contract (R. 171, 419). There is not a shred of evidence that the company believed it was required to discriminate by the previous agreements. There is none that it did so.

After negotiations in 1954 and 1955 had been unsuccessful, Local 165 presented the proposals here involved. The company objected. It believed the proposal would increase costs by half a million dollars, and resisted, particularly, the jurisdiction and Laws clauses. (R. 424). As to the latter it proposed individual negotiation, but its counterproposal did not assert illegality. (R. 371-2). Not until after the unions had declared an impasse and mediators had been called in were legal issues raised (R. 427-28). After the union's first strike vote, Mr. Hanson became the company's chief negotiator. He repeatedly said that the Laws clause was illegal. He also said, as the Board notes (Bd. br. p. 8), that management would not take the General Laws *in toto*. He did not specify which were illegal. (Compare the list in *amicus* brief of charging party pp. 19-20, with Appendix B in our main brief and Bd. br. #339 pp. 6-7, n. 4). But saying something and "understanding" it are not the same; no evidence to support an "understanding" is cited. Mr. Hanson also expressed the view that the jurisdiction proposal was illegal (R. 117, 119), but even the Board refused to so hold. (R. 481, n. 2).

The statement that these clauses are in "flagrant contempt" of the decree in *ANPA v. NLRB*, 193 F. 2d 782 (Brief *Amicus*, p. 21) is wishful thinking. Shortly after the decree in that case was entered, Mr. Hanson, who is also counsel for the American Newspaper

Publishers Association (see *ANPA v. NLRB*, 345 U.S. 100, 101), so charged, but the Board, after full investigation, took no action (R. 259). Historically, and with particular vigor since 1944, well before passage of the Taft-Hartley Act (See 86 NLRB at 971, 983); that Association has vigorously fought the concept of the ITU General Laws, doubtless because it believes that their elimination would be economically advantageous to its members.⁴ It is entirely understandable that the ANPA should

⁴ Employer attitudes on this subject are also demonstrated by the ambivalence of the brief of the respondent News Syndicate in No. 339. See particularly p. 3, n. 4, p. 6, p. 7, p. 8, p. 10, n. 12; The News' final prayer (*Id.* p. 33), that the judgment below be affirmed, thus demonstrates that when matters of principle are at stake, newspaper publishers, to quote Mr. Dooley, "don't care no more f'r money thin I do f'r m' right eye."

That Brief quotes Woodruff Randolph, then President of the ITU, as talking of a continuing "struggle with employers to maintain our General Laws as a basis of union shop operations" (pp. 8, 10, n. 12). The precise testimony was:

"Q. *Before the Taft-Hartley Act came into effect*, what was your definition of a union shop?"

A. A union shop was one employing only members of the union on work processes covered by our jurisdiction.

• • • • •

Q. Isn't it a fact that you used 'union shop' here (in a speech made in 1957) in the traditional sense, in the pre-Taft-Hartley sense?

A. That the employer contracts with us?

Q. That you have had a nation-wide struggle with employers to maintain your general laws as a basis of union shop operations?

A. *That means the kind of shop where the employer contracts with us at the present time.*

Q. You have changed, then, the definition of 'union shop' by your own words?

A. As I said, it has been corrupted. In no sense do I ever

seek to use Federal legislation to achieve long-sought and cherished objectives. The thrust of the earlier litigation was a contention that enforcement by the ITU of its General Laws constituted "restraint and coercion," an argument which was squarely rejected. See *Matter of ITU*, 86 NLRB 951, 957; *ANPA v. NLRB*, 193 F. 2d 782, 800-801 (CA 7).

In this proceeding, Mr. Hanson, now on behalf of Worcester, excepted to the failure of the Trial Examiner "to recommend that Respondent ITU rescind all ITU laws (including any provisions in the Constitution, By-Laws, General Laws or Convention Resolutions) that are in conflict with the Act or that have been used or may be used to thwart such Act."⁵ Whether in the face of the decision in the *ANPA* case, and the proviso to Section 8(b)(1)(A), this represents an "understanding" is not genuinely relevant. The course of events since passage of the Taft-Hartley Act (see our principal brief, p. 16, n. 9, pp. 35, 38-39) could lead only to an "understanding" that these clauses were lawful.

want to mean that kind of a union shop that the Taft-Hartley prohibits. The union shop as it is used any time I use it, means a shop whereby the employer contracts with the local of the I. T. U. for work over which we exercise jurisdiction.

Q. And which work is done by your members only?

A. No; there are some non-union men around here and there in shops.

Q. However, when I asked you whether you used this 'union shop' term here in the pre-Taft-Hartley sense, I believe you said that you had, and you admitted that you had?

A. I didn't answer that particular question. I didn't say yes to that because pre-Taft-Hartley union shop and closed shop were synonymous". (B. #339, p. 270, R. this case, p. 300-01, emphasis supplied.)

⁵ Exception #23 at p. 6 of the Exceptions of Charging Party, in the full record on file with the clerk.

B. We are thus faced with the contention that the opinion of a single attorney, not shared by attorneys for newspaper publishers generally (R. 260), is dispositive. The ground for his opinion is stated by the Board to be that adoption of the General Laws clause "would establish a closed shop" (Bd. br. p. 24). Even the Board does not so contend; its argument is that some employees might (erroneously) so conclude. We have set forth in our principal brief (pp. 16-29) the constantly shifting theories by which the Board asserts this clause to be unlawful; we are not informed which of them Mr. Hanson adopts as his own. We suggest that if the opinion of counsel is now to be sought as a substitute for adjudication, the sample should be broader than the attorney for the charging party. We "understand" that this clause is lawful, and for what we feel to be sufficient reasons, but we have undertaken to argue our reasons, not our "understanding."

Like the Board, the charging party in its brief *amicus* filed in this Court, rests its argument on events occurring in 1947 and 1948. But, as was pointed out in *NLRB v. Amalgamated Local 286, etc.*, 222 F. 2d 95 (CA 7),

"It is fundamental that the burden was on the Board to prove the charge made in the complaint, not on respondent to disprove an intention which the Board might arbitrarily choose to read into the agreement . . . We cannot condone a procedure which attempts to define that intent by grafting onto a contract a disinterred provision of a deceased agreement" (pp. 97-98).

The disinterred remnants of deceased litigation are no more germane. And when the Board relies on testimony given by the President of the ITU in opposition

to this legislation (Board br. No. 339, pp. 28-29), it does not merely exceed the bounds of relevancy. It strikes to the heart of our political system—the right to petition Congress for redress of grievances. *United States v. Rumely*, 345 U.S. 71; *Eastern R. Conf. v. Noerr M. Freight*, U.S. , 29 LW 4191, 4194-95, slip op. pp. 10-13, (Feb. 20, 1961).

In short, the Board says that the Laws clause is illegal because the *employers* say it is *illegal*, and because the *unions* insisted it was *legal*. To seek confirmation “of the validity of the Board’s view” (Bd. br. p. 24) by such reasoning, on this record and these findings, is an act of desperation.

C. A potpourri of history (much of it pre-Taft-Hartley) and surmisings regarding what other people might think or may have thought constitutes the “practical context” which is contrasted (Bd. br. p. 25) with petitioners’ “academic” contention that the “plain language of the proviso to the laws clause” means what it says. We think the “practical context” which is relevant to an understanding of the Laws clause is the experience under it. There is no dispute but that it has been in general use since 1948. Prior to this case there were only three instances in which it had been asserted that there had been discriminatory conduct involving local unions of the ITU. In *Matter of Kansas City Star Co.*, 119 NLRB 972, the Trial Examiner recommended dismissal of the complaint, but the Board, with two members dissenting found that certain employees, not covered by the agreement, had been discriminated against. In *Honolulu Star-Bulletin v. NLRB*, 274 F. 2d 567, 571 (CA9C), the Court sustained a finding that one man had been unlawfully discharged. In *NLRB v. News Syndicate*, 279 F. 2d

323, 334 (CA 2), #339 this Term, the Court upheld a finding that one employee had been denied a single night's work. In both cases the Courts noted substantial evidence to the contrary, and their affirmance can fairly be said to demonstrate scrupulous adherence to the limits of their review powers. And in each case the Court expressly and decisively found that the hiring practices under the agreement were lawful. 274 F. 2d at 569; 279 F. 2d at 331-334. This is the thirteen year record. More significantly, *the discrimination found in those cases had no relationship to the agreement or to any General Law.* In each of them the agreement, and the practices under it, were found to be lawful. Why should the Court speculate how the proposals here might be enforced, when experience supplies so clear a guide? Surely, if these proposals inevitably (or in any case) had the consequences which the Board attributes to them, some proof of that fact should be forthcoming. What more, under the Act, can the Board demand than that agreements be lawful on their face and that they be lawfully administered?

As stated in 6 Corbin, *Contracts*, Sec. 1533 (pp. 1054-55) (1951),

"If the bargain is one that is capable of being performed lawfully the court will not assume a purpose to perform it in an unlawful manner; proof of such a purpose would have to be made."

And, in the 1958 Supplement at page 153,

"Of course, the presumption is that purposes are lawful, and the contract will be enforced unless defendant asserts and proves the contrary."

The rule is well settled that,

"The burden of showing illegality is upon the party asserting it and it is not sufficient merely to create confusion and suggest doubts as to legality."

Palmer v. Chamberlain, 191 F. 2d 532, 539 (CA 5); see also cases cited in Mailers' br., #339 at p. 20.

This practical experience demonstrates the fallacy of the Board's argument that an improper motive can be found on the basis of events occurring thirteen years ago; indeed, as we have pointed out (Brief in No. 339, pp. 7-8), the Board has made no such finding. Even had it been made, while motive "... is a persuasive interpreter of equivocal conduct" (*Texas & N.O. Ry. Co. v. Brotherhood*, 281 U.S. 548, 559), where, as here, the conduct is unequivocal "... the existence of a bad motive, in the case of an act which is not itself illegal, will not convert that act into a civil wrong." Lord Watson in *Allen v. Flood* [1898] A. C. 1; *Eastern R. Conf. v. Noerr M. Freight*, U.S. , 29 LW 4191, 4195, slip op. p. 12 (Feb. 20, 1961); *U. S. v. Rock Royal Co-op.*, 307 U.S. 533, 560.

D. The Board returns to its argument that "the employees would not undertake to decide for themselves which of the laws were excluded as illegal but as a practical matter, not being judges or lawyers, would treat all of the laws as incorporated." (Bd. br. p. 23) If employees would not undertake to make this decision—and we think sensible employees would not wish to engage in this academic speculation—then, "as a practical matter," they would conclude that the terms of their employment were governed by the lawful provisions of the agreement. As a condition of maintain-

ing lawful agreements, the parties are not required to write a treatise on labor law, setting forth the myriad circumstances which can arise and providing satisfactory answers to all of them, with the Board grading the papers by way of a contempt proceeding, particularly when the Board has so clearly demonstrated that it does not itself know the answers. We *can not* write agreements in such form that they will survive the illiteracies and suspicions which the Board so facilely attributes to employees. By this reasoning a contract provision granting higher wages could be declared illegal because of the Board's assertion that some unidentified nonunion employee might apprehend that the benefit would be extended only to union members:

In its petition for certiorari in *News Syndicate* the Board stated that "the same technique" as the Laws Clause "was utilized in the National Bituminous Coal Wage Agreement" of the United Mine Workers. Pet. #339, text and note at p. 18, n. 15. The Board's decision in *Perry Coal Co.*, 125 NLRB #110⁶ was cited to show that this clause was unlawful. That decision was reversed in *Perry Coal Co. v. NLRB*, 284 F. 2d 910.

⁶ "It is well settled that where, as here, a contract contains an unlawful provision, a general 'savings clause' that does not specify to what extent the provision is intended to be limited will not purge such a provision of its illegal character. Thus, the qualifying language in this provision—'to the extent and in the manner provided by law' . . . fails to set forth in clear and unambiguous terms limitations on the requirement of union membership that conform the provision to the union-security standards of Section 8(a)(3) of the Act. We do not believe that the burden of statutory and judicial interpretation can reasonably be placed upon an employee to be acted upon at his peril. In view of the vague and general savings clause, we conclude that the union-security clause in the National contract provides for an unlawful closed shop." 125 NLRB 1256, 1257.

914, the Seventh Circuit relying on and reaffirming *Lewis v. Quality Coal Corp.*, 270 F. 2d 140, *cert. denied*, 361 U.S. 929 (which was also cited by the Second Circuit in *News Syndicate*, 279 F. 2d 323, 328).

The Board makes no effort to deal with these authorities whose relevance it had asserted in its *News Syndicate* petition. The Board's brief in that case, its main discussion of the legal issue, attempts to brush them aside (Br. #3:9, p. 22, n. 13). Its brief herein ignores them entirely, although our opening brief (p. 18) had pointed out that they (and the decisions of the Sixth Circuit and various District Courts also upholding the UMW contracts) repudiated the Board's position, and especially its reliance on *Red Star Express*, which is still the Board's sole prop. Though the Board bury them, yet these decisions are still in the reports and their reasoning, as well as that of the Second and District of Columbia Circuits, is sounder than that of the Court below.

The holding of the court below (See Bd. br. p. 25, n. 9) rests on its conclusion that "ITU's insistence that Union language must be taken with respect to its general laws demonstrates that ITU would not approve any contract provision substantially in conflict with its laws" (R. 523). But such a conflict is plainly apparent on the face of the language proposed; i.e., that any General Law "in conflict with federal . . . law" was not to be incorporated, and any law calling for closed shop conditions would therefore be excluded in circumstances where enforcement would result in a violation of Federal law. The contract proposal itself thus demonstrates on its face the willingness of the ITU to approve a contract provision "substantially in conflict with [certain of] its laws," coupled with

a clear recognition of the supremacy of Federal law over the General Laws. This is but another facet of the Court's erroneous "incorporation by reference" technique.

E. The eye of the hurricane of this litigation, both past and present, is to be found in the assertion (Bd. br. p. 24) that the Union negotiators stated that they would not "take the book of laws and sit down and negotiate law No. 1, whether it applies to the contract or not, we would not do that" (id., n. 8). This is true enough, but it elides essential problems; it certainly provides no basis for an assertion that the publishers thereby "in fact" understood that this called for closed shop conditions.

As civil society is bound together by its laws, so the Laws of the ITU are the essential cement by which *union* is achieved. It is conceived that these Laws, for the reasons set forth at pages 12-13 of our principal brief, when democratically adopted by majority vote of the members, are binding on all local unions and members (except, as they make clear on their face, when their enforcement might result in a violation of law). The artful, and seemingly innocuous, attempt of the employers here—to induce the Union representatives to negotiate them one by one—is a traditional technique. If accepted, it would require local unions to assert a power and authority to set aside or modify the General Laws as they wished, contrary to this basic compact. But if local unions have such power, the entire union structure crumbles; in negotiation after negotiation, the substance of the General Laws could be frittered away, and instead of serving the function of providing decent minimum standards, they would

be merely precatory, if that. This has been, for many generations, the objective of the ANPA: to substitute anarchy for the rule of law, to retrace the painful steps by which the General Laws have reached their present maturity, by picking off, one by one, the weakest local unions and thus debasing working conditions generally. The Board is entirely right in stating that on this issue the ITU has been uncompromisingly intransigent, for what we conceive to be the most valid reasons. This issue goes to the basis of union itself, is intimately entwined with internal union democracy, and represents an effort to retain the achievements of generations of struggle.

Similar considerations apply to the Union's refusal to arbitrate the General Laws (Bd. br. p. 24). This problem is developed in the record (R. 96, 277-278). The position of the ITU has been that its General Laws are not subject to arbitration, though the "facts concerning any dispute, whether governed by the contract provision or governed by a law effective through a local commitment, is subject to arbitration and settlement as a finality by the Joint Standing Committee" (R. 96).⁷ From 1901 to 1922 they were arbitrable (See *Matter of ITU*, 86 NLRB 951, 971). The practical consequence was to give a hypothetical example, that when ITU members adopted a General Law calling for a maximum 48 hour week, the matter could be taken before a board of arbitration which might decide that a 56 hour week was warranted. The adoption of a General Law thereby became no more than a state-

⁷ Randolph gave as an example the General Law on reproduction (see *ANPA v. NLRB*, 345 U.S. 100, 104) under which there are frequent arbitrations. See, e.g. *Philadelphia Daily News and ITU Local #2*, 33 LA 765 (Turkus, Arbitrator).

ment of a desired objective, the possibility of effective action was blunted, and the democratically expressed desire of the members was defeated. For these reasons, action was taken to preclude the arbitration of the General Laws. The problem is identical with the relations between courts and legislatures. In performing their important function of interpreting and applying statutes, courts do not undertake to decide what the action of the legislature should have been, but accept the statute as written. So here, boards of arbitration may interpret and apply the General Laws when a problem arises, but they are not to act as legislative bodies. We submit that nothing in the Act requires the parties to agree that particular matters must be arbitrated; the distinction here is between arbitrating the terms of a new agreement, and arbitrating controversies that arise under existing agreements. Compare *Bus Employees v. Wisconsin Board*, 340 U.S. 383, 394-95 with *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 566.

The alternative proposed by the Union negotiators; i.e., that the parties discuss the conditions covered by the General Laws and negotiate about them (See our principal brief, p. 16, n. 9), was and always has been open. Indeed, contrary to its position here, (Bd. br. p. 25, n. 9) the Board recognized that the contract supersedes inconsistent provisions in the Laws, (R. 451, 453).^{*} For example, had the publishers had a genuine belief that the Union proposals were intended

^{*} As a result, the Board was driven to tortuous argumentation to avoid the thrust of the nondiscriminatory definition of "journey-men" here (R. 451) and in the *Honolulu* case, 123 NLRB 395, 399, reversed, 274 F. 2d 567.

to create closed-shop conditions, it was open to them to propose the language contained in the agreement in *Honolulu Star-Bulletin v. NLRB*, 274 F. 2d 567, 569, that "The term 'journeymen' and 'apprentices' shall in no way be understood to apply exclusively to members of the International Typographical Union"; as the Court noted (at page 569), that agreement had been approved by the ITU. The General Laws clause on its face and the testimony in this case, clearly shows that such contract provisions, if agreed to, override any specific General Law (See R. 210-212, 274-277, 279-280, 451, 453; *Matter of ITU*, 86 NLRB 951, 970; *Honolulu Star-Bulletin v. NLRB*, 274 F. 2d 567, 569). As we have pointed out (Br. p. 27), the Union proposals, by defining journeymen and apprentices in non-discriminatory terms, would override any closed shop provisions of the General Laws.

The most glaring omission in the Board's brief is its failure to cite any record evidence indicating that the Unions intended that these proposals be unlawfully applied; the contrary clearly appears (See Br., p. 16, n. 9). An asserted publishers' "understanding", not found to exist by the Board, is not a substitute. Despite the clear language of the proposals and all the evidence of record, the Board and the court below nonetheless adopt the technique of elaborate speculation as to what was probably intended, and this before any executed agreement is available for analysis. The Board attempts a strange *tour de force* in arguing (Bd. br. p. 24) that the Unions' "intransigence" in insisting on the legality of their conduct somehow demonstrates an illegal motivation.

In sum, "In the practical context which the Board" *should have considered*, its inability to read and understand "the plain language of the proviso to the laws clause" (Bd. br. p. 25) is not "academic"; it is sophomoric.

II. THE FOREMAN CLAUSES ARE VALID.

The Board meets our contention that it must be presumed that foremen will act lawfully, rather than the contrary, by stating that this could be true "only where, unlike here, the employer had not delegated complete control over hiring to the foreman, but had prescribed some standards for the discharge of that function or had otherwise reserved control over it" (Bd. br. p. 28). As we demonstrated in our principal brief (p. 31), the employers here had Union foremen, by their voluntary choice and without the compulsion of an agreement or other Union action. The Union proposals were that the *status quo* be continued, and that non-discriminatory standards of hiring, based on competence and experience, be adopted (Br. p. 27). It is ironic that the Board should insist that the Unions' action (in seeking by agreement non-discriminatory standards for hire) constitutes a delegation of "complete control to the foreman;" if foremen are as intent on violating the Act as the Board would have this Court believe, the Unions' proposals are clearly in aid of the statutory purpose. "Complete delegation" preceded, but would not follow, acceptance of the proposals here made. Essentially, the Board's argument is that the publishers violated the Act by unilaterally engaging a Union foreman.

The Board's argument is summarized in its statement (Bd. br. p. 28) that "if, as here, the foreman were given the power (over hire) without more, there would be

no reason for him to assume that he did not remain free to exercise it in accord with his obligations as a union member" There are compelling reasons for assuming the opposite.

First is the presumption that the citizen will obey the law. Since the Act forbids discrimination in hire, the presumption is that the foreman would not discriminate. "But a mere power to discriminate is not illegal as even the Board appears to recognize" *News Syndicate*, at page 330.⁹

Second is the agreement. As we have shown in our principal brief (p. 27) the contract proposals made by the Unions plainly stated on their face that hire was to be based on competence and experience, not Union membership or non-membership. For reasons which are obscure, the Board asserts (Bd. br. p. 30) that "the foreman clause was coupled with the General Laws clause". The Board made no such finding, but assuming its correctness, the foreman would be aware, from the form of that clause, that any General Law calling for discrimination in hire was suspended. The foreman would be bound to the agreement above any Union obligations.

Third, foremen have no such "obligation" as Union members. As early as 1948, the Court in *Evans v. ITU*, 81 F. Supp. 675, 681, 683-685, (N.D. Ind.) noted that a then-existing oath of membership which, it was claimed, required foremen to discriminate had been

⁹ "Potentiality to commit an act cannot be used as a substitute for proof of the act itself. While it has been said that every person has a little larceny in his heart, not even a cynic would attempt to procure a conviction on that ground alone." *Anheuser-Busch, Inc. v. Federal Trade Commission*, — F. 2d — Slip Op. p. 13 (CA 7, Jan. 25, 1961) (on remand from 363 U.S. 536).

abrogated. And see *Matter of ITU*, 86 NLRB 951, 1020, n. 60. Article XII of the Constitution which required members to prefer other members in hire was repealed in 1953 (R. 270). We have already sufficiently discussed the proviso to the General Laws clause which also makes it clear that discrimination in hire is not required, and the amendment of the General Laws, by the addition of Article XIV, which makes clear that any General Law which may be interpreted to require discrimination in hire, where such action would be unlawful, is suspended. How often will the Board require that this be made clear? If saying it in four different ways is insufficient, what will satisfy the Board? Or are we to assume that only a declaration compelled by a Board Order is enough?

And the fourth is demonstrated experience. *Honolulu Star-Bulletin* (at page 579) and *News Syndicate* (at pages 331-334) both show that Union foremen do, in fact, perform their duties in non-discriminatory fashion. The Board's speculative hypothesis assumes that foremen would disregard the requirements of law, the agreement between the parties, the oft-repeated position of the ITU, and practical industrial experience in order to discriminate in hire. This *per se* rule is yet another instance of the Board's "mental pole vaulting with only a presumption as a pole". *NLRB v. Insurance Agents*, 361 U.S. 477, 482-83, n. 4 & 5. Since the presumption here is that a citizen will violate the law (*Enterprise Industrial Piping*, 117 NLRB 995) it is doubly offensive.¹⁰

¹⁰ The cases cited at Bd. br. pp. 29-31, n. 14, are not contrary to *Honolulu Star-Bulletin* and *News Syndicate*, which we have shown (Br. p. 34) reject the *Enterprise* "principle." In *United States Steel Corp. v. NLRB*, No. 311, this Term, petitioners rely on *Honolulu* as establishing a conflict. (Pet. for cert. pp. 12-13).

The Board's brief (p. 32) now embraces the ground of decision adopted by the court below (R. 522) (but not relied on by the Board theretofore) that the "effect of the (foreman) clause would be to cause the employers to discriminate in favor of union men thereby encouraging aspirants for that position to join the union" (See our principal brief, pp. 36, 37). This was not put in issue by the complaint (*Morgan v. U. S.*, 304 U.S. 1; *Consolidated Edison v. NLRB*, 305 U.S. 197, 238); was not found by the Trial Examiner (R. 449); and no party excepted to the failure to so find. See § 102.46(b) of the Board's Rules and Regulations by which the Board is, of course, bound. *Vitarelli v. Seaton*, 359 U.S. 535. This policy is embodied in § 10(e). *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385 and other cases cited in pet. for cert. in *NLRB v. Brandman Iron Co.*, #646, this Term, p. 6. And the Board did not so find (See R. 480-481). An examination of *Pacific Shipowners Association*, 98 NLRB 582, demonstrates that the Board has rejected this ground of decision, as we said in our principal brief (p. 36). The Board's reliance on a *dictum* therein (Bd. br. p. 32, n. 16), dealing with an entirely different set of facts, to support the decision of the court below does no more than indicate the Board's eagerness to show that the conduct here complained of was unlawful by *any* means.¹¹ Indeed, *Pacific Shipowners* additionally re-

The Board, however, says that it does "not conflict in principle with decision here" (in *U.S. Steel*) but is "distinguishable on its facts." (Memorandum for NLRB in Opposition, p. 3, n. 2). In each of the other cases cited here by the Board there were findings of actual discrimination.

¹¹ Since our principal brief was filed, the Court of Appeals for the District of Columbia Circuit enforced, with modifications, the Board's order in *Detroit Association of Plumbing Contractors*, 127

futes the Board's metaphysical contention (critical to its 8(b) (2) and 8(b) (1) (B) arguments) that the foreman clause would limit the employer's choice of supervisors in a sense cognizable by the statute. (Bd. br. p. 33, n. 17; pp. 39-40, n. 22). The opinion made clear that the statutory exclusion involved both being and becoming a "supervisor". 98 NLRB at 596-97.

III. THE STATUTORY OBLIGATION TO BARGAIN WAS FULFILLED.

While the demonstrated legality of the Laws and foreman clauses disposes of the case, as the Board's restatement of the Questions Presented (Bd. br. pp. 4-5) correctly recognizes, a few words on the Board's discussion of the refusal to bargain issue (which is not involved in #339) will not be amiss.

Most significant is what the Board does not say. Its brief makes no mention of *NLRB v. Insurance Agents*, 361 U.S. 477, this Court's recent and thorough

NLRB No. 28, cited at p. 35. *Local 636, Plumbers, v. NLRB*, F.2d, 47 LRRM 2757 (January 19, 1961). The Board has not cited this case in its subsequently-filed brief, though we concede that the opinion is in certain respects at variance with our argument herein. We shall not therefore undertake to demonstrate what we feel to be the numerous errors in that opinion, the most serious of which is the holding that Section 14 (a) of the Act limits supervisors to non-participating membership in unions. *Id.* at 2762. This is not "the basis which they enjoyed before passage of the Wagner Act" (See our principal brief, pp. 31, 33). The Board fails even to mention in its brief the impact of the amendments to Sections 2(3), 2(11) and 14 (a) of the Act in 1947.

Indeed, the Board seeks to establish infringement of employees' Section 7 rights on the authority of a case decided before these amendments removed supervisors from the definition of employee. (Bd. br. p. 33, n. 18). This silence almost of necessity precludes further discussion of this issue.

analysis of the obligation to bargain. We think this case is decisive; it holds that the Board may not intrude itself into the "substantive aspects of the bargaining process" (*id.* at 498). (Br. pp. 29, 39, 48). And it defines a union's obligation to bargain in terms which were clearly satisfied here. For it is conceded by the Board and the Court below that the unions "approached the bargaining table with [an] attitude of willingness to reach agreement." (*id.* 487).¹²

The Board's sole citation (Bd. br. p. 34) of the other leading case, *NLRB v. American National Ins. Co.*, 343 U.S. 395, is in support of a proposition which this Court expressly "put aside" and which is therefore not "settled."¹³ (Bd. br. p. 35) We reassert that the Board's approach here and the standard applied by the Court below (R. 522)¹⁴ cannot be squared with that decision.

¹² There is no finding here, as in the *ANPA* case (to which reference is made at 361 U.S. 487, n. 13) that the union entered into "negotiations with a fixed and determined purpose of avoiding the making of an agreement." 193 F. 2d 782, 804.

¹³ *NLRB v. National Maritime Union*, 78 NLRB 971, *enf'd* 175 F. 2d 686, (CA 2) *cert. denied*, 338 U.S. 954, (Bd. br. p. 34) is not, in any event, in point since the Board found that the NMU insisted on the perpetuation of an illegal hiring arrangement with the intention that it continue to be applied discriminatorily. 78 NLRB at 977, 978, 982. The Court of Appeals did not discuss this issue.

¹⁴ Indeed, we suggest that the discussion at R. 522-23 and R. 525-26 is inconsistent with the Court's own analysis of the duty to bargain in connection with the jurisdiction clause. (R. 520) And since the clauses were concededly of "honestly disputable validity" (R. 525, Bd. br. p. 15), and "good faith" is the statutory standard, we think there is more eloquence than reason in the statement that "to hold that good faith is a defense to the charge of refusal to bargain when the contract provision insisted on is illegal *per se* is to put a premium on ignorance of the law or blind intransigency." (R. 522-23).

The reach of the Board's argument from *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (Bd. br. pp. 35-36) is not clear. If it is intended to suggest that the matters here in issue were not subjects of "mandatory bargaining" within the meaning of that case (356 U.S. at 349) the argument is not open on this record. The Trial Examiner made no such finding; the General Counsel specifically excepted to his failure to do so (See Exceptions to Intermediate Report of General Counsel, No. 5), but the Board made no such finding. In any event, it is clear that matters such as apprenticeships, priority, hire, discharge and the other areas covered by the General Laws and the duties of the foreman are embraced within "other terms and conditions of employment," as set forth in Section 8(d). Thus as to these matters, while bargaining is required, agreement is not, and either party may insist upon its version of the substantive bargain, including adherence to the General Laws upon any subject not covered by the agreement, at least so long as it has been made clear that no General Law is to apply where its enforcement might result in a violation of law. Agreement upon these subject matters as proposed by the Unions does not detract from an obligation imposed by the statute, as was true of the recognition clause in *Borg-Warner*, nor does it interfere with representation rights, as this Court said of the "ballot" clause in that case (See p. 350). They are the traditional stuff of collective bargaining. As the Court made plain in *NLRB v. Insurance Agents*, 361 U.S. 477, at 487, *Borg-Warner* still is based on the principle that the obligation under Section 8 (b)(3) is to bargain in "good faith." Here "good faith" was expressly found. (R. 256; 517, 525).

IV. THE ITU IS NOT A BARGAINING REPRESENTATIVE OF THESE EMPLOYEES.

The Board declares that its "holding in this case" does not mean "that an international will always be held responsible for the acts of its locals, notwithstanding that its constitution and by-laws disclaim such responsibility" (Bd. br. pp. 42-43, n. 24). We are pleased to learn this, but are puzzled what the criteria for decision are, since the Board adheres to its view that the ITU is responsible. It cannot be that ITU officials "pursuant to authority vested in them by the ITU, called strikes," (Bd. br. p. 42). We have shown that they had no such authority, Br. p. 44, par. (g), and while they sanctioned, did not call, the strikes for which the members of the locals had voted in both instances. (R. 100, 224). Nor can it be because "Lyon and La Mothe participated in the negotiations *mainly to further*" these [allegedly illegal] policies. (Bd. br. p. 42, emphasis supplied). The Board did not so find (See R. 459), and their actual role was as set forth at p. 44, par. (f) of our brief. Indeed, to the extent that illegality is sought to be predicated on the foreman clause, it may be noted that the approved contract in the *Honolulu* case did not require the union member to be a foreman.¹⁵

¹⁵ See Joint Appendix, *Honolulu Star-Bulletin v. NLRB*, CADC #15,044, p. 159. The *amicus* brief in this case relies also on the communications sent by the President of ITU advising that the foreman clause was not an issue in the strike at Worcester. (Br. *amicus*, p. 23). Since the Board would have instituted contempt proceedings if they had not been sent it would have been "the most indefensible sort of entrapment" for the Board to draw any inference of ITU responsibility from them. Compare *Raley v. Ohio*, 360 U.S. 423, 438. The Board properly did not do so.

The cases cited by the Board (Bd. br. p. 42, n. 24) do not shake our conviction that an international and one of its locals cannot *both* be the *exclusive* bargaining agent of the same employees. (Br. pp. 44-48). We have previously discussed *ANPA* (Br. p. 46). In *May Department Stores v. NLRB*, 326 U.S. 376, 381 a Joint Board consisting of several unions, had been certified as the *single* bargaining representative. In *NLRB v. E. A. Laboratories*, 188 F. 2d 885, 888 the Board ordered the employer to bargain with the International alone, the Local being defunct.¹⁶

V. THE BOARD'S UNLAWFULLY BROAD ORDER COMPOUNDS AND REFLECTS ITS ERRORS ON THE MERITS.

The Board says that its Order is "well adapted to the situation which calls for redress" (Br. 40). The Board throughout insists that the "situation which calls for redress" is that some unidentified employees might mis-read the plain language of the agreement. If these employees cannot read an agreement, what warrant is there for assuming that they can read an Order?

The Order (R. 482, 484) proposes that these employees are to be told in four separate paragraphs (I(a)(2), (3); II(a)(2), (3)) that the petitioners are not to violate "Section 8(a)(3) of the Act". Will this give them the blissful reassurance which "not in conflict with law" does not? The Order is, indeed,

¹⁶ Nor is it relevant that in the *E. A.* case the local and international had originally both been parties to the agreement, by their own choice. Compare *Borg-Warner*, 113 NLRB 1288, *aff'd* 356 U.S. 342: "The Respondent recognized that the Local and the International were, in fact, separate entities . . . the recognition clause originally proposed by the International included the name of the Local as a separate party *whereas the certification did not do so.*" 113 NLRB at 1292-93. (emphasis supplied)

woefully inadequate to the "situation which calls for redress"; the only appropriate remedy in the circumstances would be the establishment of labor law institutes at which all present and potential employees in this industry could be taught that language means what it says and that, under the Act, the contract proposals here in issue can be, and have been, lawfully applied. It might, of course, be difficult to staff such schools, when the instructors would be aware that any misstatement of applicable precedents would bring "the swift retribution of contempt" *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 233; but many hours of gainful employment would be created by interesting discussions as to which of the General Laws might be lawfully or unlawfully applied and under what circumstances.

The Board's discussion rather artfully suggests that only a stubborn refusal of the ITU to modify certain language in its General Laws is involved, and that if it would be complaisant and undertake this simple task, all would be well. But we have shown that this massive assault on the General Laws involves basic and important questions. (pp. 14-16, *supra*.)

a. First, and perhaps most important, is the extent of the Board's power to supervise the collective bargaining process. By insisting that the proposed General Laws clause incorporates in the agreement matters specifically excluded therefrom, contrary to the rule in *Guerini Stone Co. v. P. J. Carlin Construction Co.*, 240 U.S. 264, 277, the Board is asserting a general power to intermeddle in the negotiation of agreements, contrary, we assert, to the rule laid down by this Court in

NLRB v. American Insurance Co., 343 U.S. 395, 404; *Carpenters' Union v. NLRB*, 357 U.S. 93, 108; *Teamsters Union v. Oliver*, 358 U.S. 283, 295; *NLRB v. Insurance Agents*, 361 U.S. 477, 490, 498. We have discussed this issue *passim* in our principal brief.

b. Of substantially equal importance is the power of the Board to interfere in internal Union affairs, a matter which the Congress expressly left untouched by the statute (See our principal brief, p. 21, n. 12). It is not disputed that all General Laws can be validly applied under certain circumstances. If, and when, (as has not yet occurred), some General Law is illegally applied, the sanctions of the Act will be available. We assert that the democratic right of Union members to adopt such rules for their governance as they choose, free of Government supervision, is a weightier consideration than the slight chance that such freedom may result in a violation of law. When one recalls the critical importance of the issue of Governmental control of the internal affairs of trade unions in the comparatively recent history of Soviet Russia, Fascist Italy, Nazi Germany and other countries, the Board's insensitivity to the problems with which it deals is revealed by its dismissal of this subject as "somewhat academic" (Bd. br. p. 25).

c. The Board suggests that its concern is with the language, not the substance, of the General Laws. (Bd. br. p. 41). Nothing could be further from the truth. Pursuant to a decree of a District Court, (*Alpert v. ITU*, 161 F. Supp. 427), revised General Laws, containing no requirements of union membership for employment, were submitted. They were referred by the

Court to the Board's General Counsel for comment,¹⁷ and as the Court noted thereafter,

"... the number of items which petitioner (General Counsel) still contests are extensive; indeed, *petitioner now objects to more than he did originally*. I will not, *and in my opinion could not*, revise and rewrite the General Laws into some new form that might or might not meet the future approval of the parties ..." (at page 432, emphasis supplied).

Concluding that it was impossible to satisfy the Board on this issue, the Court thereupon relieved the union of a stipulation that it attempt to do so, in order that collective bargaining to settle a strike might proceed. This is the "definite standard" which the Board has provided (Bd. br. p. 41). See also Appendix B to our principal brief whose significance the Board entirely ignores. It is entirely plain that contempt action will follow if this task is attempted. The impossibility of compliance is neatly illustrated by the last two cases set forth in Appendix B: *Tribune Publishing Co., et al.*, 20-CA-1553, etc., *Newspaper Agency Corp., et al.*, 20-CA-1556, etc. The complaints in those cases were issued on the same day, by the same Regional Office, and were signed by the same person. *Each attacks a different set of laws.*

¹⁷ These comments attacked thirty-seven of the General Laws as revised, including Article I, Section 1 which, as we noted in our main brief (pp. 25-26), was designed to prevent the exploitation of child labor. The General Counsel appended these comments to his brief to the Board in this case, on file with the clerk of this Court. They are instructive as they furthest reach to date of the Board's technique of surmise and suspicion. Yet the ingenuity of the Board and its agents is such that we may expect even wilder flights of fancy if this Court does not call a halt in the ITU cases and in *Local 357, IBT v. NLRB*, No. 64, this Term.

The Board's *Mountain Pacific*, 119 NLRB 883 and *Pacific Intermountain Express*, 107 NLRB 837 doctrines, and its conduct in these cases, demonstrate a consistent effort to drive unions from any meaningful participation in decisions affecting industrial enterprises. It is our view that the national labor policy—the encouragement of collective bargaining—looks in an exactly opposite direction, to greater sharing in the making of such decisions. Under such a policy the dignity of workers is enhanced, industrial strife is avoided, and responsible citizenship is encouraged. At bottom, the Board embraces the feudal concept of master and serf. It attempts to achieve these results by mis-reading the decisions of this Court in *Radio Officers* and in *Borg-Warner*; the former as eliminating the words “by discrimination” in Section 8(a)(3) and the latter as curtailing the freedom to bargain, when that case dealt solely with the Board’s power to compel bargaining in aid of the statutory purpose. (See Bd. br. pp. 35-36).

The architect of the national labor policy, Senator Wagner, set forth its true goal during the debates on the Norris-LaGuardia Act:¹⁸

“We can raise a race of men who are economically as well as politically free. By permitting labor to organize freely and effectively we can convert the relation of master and servant into an equal and co-operative partnership, shouldering alike the responsibilities of management and sharing alike in the rewards of increasing production.

“To me the organization of labor holds forth far greater possibilities than shorter hours and better wages. Organization plants in the heart of every worker a sense of power and individuality, a feel-

¹⁸ 75 Cong. Rec. 4918 (1932):

ing of freedom and security, which are the characteristics of the kind of men Divine Providence intended us to be."

CONCLUSION

For the reasons stated in our principal brief and herein, we submit that the answer to the Board's principal question (Bd. br. p. 4), "Whether the Board properly concluded that acceptance of the proposed Laws and foreman clauses would have established an employment system which conditioned employment upon union membership, in violation of Section 8(a) (3) and 8(b) (2) of the National Labor Relations Act" is "No." Our principal ground is the demonstration, which is not and cannot be challenged here, that such agreements can be and have been lawfully applied and that speculation concerning the manner in which they might be administered is therefore entirely inappropriate. We agree with the Board that the remaining questions presented (Bd. br. p. 5) are reached only if the principal question is answered in the affirmative; the answer to them is also "No."

Respectfully submitted,

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